Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-754

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
ROBERT B. REICH,
Assistant to the Solicitor-General,
SHIRLEY BACCUS-LOBEL,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statute involved	2
Statement	3
Summary of argument	9
Argument	16
I. A "putative defendant" called as a grand jury witness is not entitled to be warned of his rights, and the rights of such a witness include neither an absolute right to remain silent nor a right to appointment of counsel	17
A. The failure expressly to advise a "putative defendant" of his self-incrimination privilege does not impermissibly compel his testimony in violation of the Fifth Amendment	19
1. A grand jury setting is not inherently coercive	21
2. Grand jury questioning is no more coercive when the witness is a "putative defendant" than it is otherwise	28
B. The *Miranda* warnings, comprising a "right to remain silent" and a right to appointed counsel, are inappropriate to a grand jury investigation	32

578—801—75——1

Argument—Continued Page

II. Respondent was not a putative defendant when he appeared before the grand jury, since the government did not then intend to seek his indictment.... 40

III. The government's failure to give adequate warnings should not result in the suppression of testimony in a subsequent prosecution for perjury..... 47

Conclusion..... 58

CITATIONS

Cases:

Blackmer v. *United States*, 284 U.S. 421..... 27
Blair v. *United States*, 250 U.S. 273..... 28
Branzburg v. *Hayes*, 408 U.S. 665..... 26, 27, 35, 36
Brown v. *Mississippi*, 297 U.S. 278..... 52
Brown v. *United States*, 245 F. 2d 549..... 56
Brown v. *Walker*, 161 U.S. 591..... 34
Bryson v. *United States*, 396 U.S. 64..... 48, 50
Cargill v. *United States*, 381 F. 2d 849, certiorari denied, 389 U.S. 1041..... 48
Cicenia v. *Lagay*, 357 U.S. 504..... 52
Cobbledick v. *United States*, 309 U.S. 323..... 25
Commonwealth of Pennsylvania v. *Columbia Investment Corp.*, 325 A. 2d 289..... 22
Costello v. *United States*, 350 U.S. 359..... 26, 36
Counselman v. *Hitchcock*, 142 U.S. 547..... 21
Directory Services, Inc. v. *United States*, 353 F. 2d 299..... 38
Escobedo v. *Illinois*, 378 U.S. 478..... 30, 31, 39, 52
Gallegos v. *Colorado*, 370 U.S. 49..... 52
Glickstein v. *United States*, 222 U.S. 139.. 14, 48, 50
Gollaher v. *United States*, 419 F. 2d 520, certiorari denied, 396 U.S. 960..... 26, 38
Groban, In re, 352 U.S. 330..... 12, 24, 38, 39
Grosso v. *United States*, 390 U.S. 62..... 49
Grumbles, In re, 453 F. 2d 119..... 38

Cases—Continued

Page

Hale v. *Henkel*, 201 U.S. 43..... 34
Hamilton v. *Alabama*, 368 U.S. 52..... 39
Hannah v. *Larche*, 363 U.S. 420..... 39
Harris v. *Beto*, 438 F. 2d 116..... 38
Harris v. *New York*, 401 U.S. 222..... 48
Haynes v. *Washington*, 373 U.S. 503..... 51
Hoffman v. *United States*, 341 U.S. 479..... 33, 34
Jenkins v. *McKeithen*, 395 U.S. 411..... 39
Jones v. *United States*, 342 F. 2d 863..... 26, 32
Kastigar v. *United States*, 406 U.S. 441..... 34
Kinsella v. *United States ex rel. Singleton*, 361 U.S. 234..... 55
Kirby v. *Illinois*, 406 U.S. 682.... 12, 21, 25, 31, 39
Kitchell v. *United States*, 354 F. 2d 715..... 26
LaRocca v. *United States*, 337 F. 2d 39..... 56
Lefkowitz v. *Turley*, 414 U.S. 70..... 48
Lewis v. *United States*, 348 U.S. 419..... 50
Lewis v. *United States*, 385 U.S. 206..... 55
Liddy, In re, No. 73–1562, C.A. D.C., decided October 10, 1974..... 40
Lowe v. *United States*, 407 F. 2d 1391..... 31
Lynumn v. *Illinois*, 372 U.S. 528..... 51
Maness v. *Meyers*, No. 73–689, decided January 15, 1975..... 34, 48
Mempa v. *Rhay*, 389 U.S. 128..... 39
Marchetti v. *United States*, 390 U.S. 39..... 49
Michigan v. *Tucker*, 417 U.S. 433..... 20, 22, 27, 29, 31, 51, 57
Miranda v. *Arizona*, 384 U.S. 436..... *passim*
Mulloney v. *United States*, 79 F. 2d 566..... 32
Murphy v. *Waterfront Commission*, 378 U.S. 52..... 51
Nardone v. *United States*, 308 U.S. 338..... 32
Perrone v. *United States*, 416 F. 2d 464..... 32
Rogers v. *United States*, 340 U.S. 367..... 34
Schneckloth v. *Bustamonte*, 412 U.S. 218.. 21–22, 23
Sorrells v. *United States*, 287 U.S. 435..... 54

Cases—Continued

	Page
Stanley v. *United States*, 245 F. 2d 427	32
State ex rel. Lowe v. *Nelson*, 202 So. 2d 232	22
State v. *Iverson*, 187 N.W. 2d 1	22
United States v. *Binder*, 453 F. 2d 805	25–26
United States v. *Calandra*, 414 U.S. 338	25, 26, 36, 57
United States v. *Capaldo*, 402 F. 2d 821	26
United States v. *Corallo*, 413 F. 2d 1306, certiorari denied, 396 U.S. 958	22
United States v. *Cross*, 170 F. Supp. 303	56
United States v. *Daniels*, 461 F. 2d 1076	38
United States v. *Del Toro and Kaufman*, C.A. 2, Nos. 74–2021, 74–2035, decided February 27, 1975	53
United States v. *DeSapio*, 299 F. Supp. 436	38
United States v. *Dionisio*, 410 U.S. 1	25, 30
United States v. *DiGiovanni*, 397 F. 2d 409, certiorari denied, 393 U.S. 924	48
United States v. *DiMichele*, 375 F. 2d 959, certiorari denied, 389 U.S. 838	22
United States v. *Fiorillo*, 376 F. 2d 180	55
United States v. *Fruchtman*, 282 F. Supp. 534	43, 44, 56
United States v. *Hall*, 421 F. 2d 540	31
United States v. *Haas*, 126 F. Supp. 817	40
United States v. *Icardi*, 140 F. Supp. 383	56
United States v. *Kahriger*, 345 U.S. 22	50
United States v. *Keenan*, 267 F. 2d 118	40
United States v. *Knox*, 396 U.S. 77	14, 48, 49, 50
United States v. *Kordel*, 397 U.S. 1	34
United States v. *Lazaros*, 480 F. 2d 174, certiorari denied, 415 U.S. 914	56
United States v. *Luxenberg*, 374 F. 2d 241	22, 32, 57
United States v. *McGinnis*, 344 F. Supp. 89	40
United States v. *Monia*, 317 U.S. 424	10–11, 21, 33
United States v. *Morado*, 454 F. 2d 167	40
United States v. *Murdock*, 284 U.S. 141	34

Cases—Continued

	Page
United States v. *Nickels*, 502 F. 2d 1173	48, 55
United States v. *Pacente*, 490 F. 2d 661, rehearing *en banc*, 503 F. 2d 543, certiorari denied, 419 U.S. 1048	48
United States v. *Parker*, 244 F. 2d 943, certiorari denied, 355 U.S. 836	48
United States v. *Pommerening*, 500 F. 2d 92, certiorari denied, 419 U.S. 1088, stay granted, January 16, 1975	48
United States v. *Rangel*, 365 F. Supp. 155, affirmed, 496 F. 2d 1059	8
United States v. *Russell*, 411 U.S. 423	54, 55
United States v. *Ryan*, 402 U.S. 530	25
United States v. *Scully*, 225 F. 2d 113, certiorari denied, 350 U.S. 897	22, 32, 35
United States v. *Sicilia*, 475 F. 2d 308	31
United States v. *Sweig*, 441 F. 2d 114, certiorari denied, 403 U.S. 932	53
United States v. *Thayer*, 214 F. Supp. 929	56
United States v. *Washington*, 328 A. 2d 98, petition for a writ of certiorari pending, No. 74–1106	22, 32
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	40, 47–48, 53
United States v. *Wong*, C.A. 9, No. 74–1636, decided September 23, 1974, ——, petition for a writ of certiorari pending, No. 74–635	18, 22, 32, 48
United States ex rel. Annunziato v. *Deegan*, 440 F. 2d 304	48
United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	33–34
Watts v. *Indiana*, 338 U.S. 49	52

Cases—Continued Page
Constitution, statutes and rule:
Constitution of the United States:
Fourth Amendment 56
Fifth Amendment 2, 9, 10, 11, 17, 19, 20, 21, 22, 26, 27, 28, 29, 32, 33, 38, 46, 49, 50
Sixth Amendment 2, 12, 31, 39, 52
18 U.S.C. 1623 ..... 3, 7
18 U.S.C. 3006A(a) 39
21 U.S.C. 846 7
Fed. R. Crim. P:
Rule 6(a) 24
Rule 6(d) 39
Miscellaneous:
Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964) 45
Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S. Cal. L. Rev. 699 (1974) 31

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-754

UNITED STATES OF AMERICA, PETITIONER

v.

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 496 F. 2d 1050. The opinion of the district court (Pet. App. D) is reported at 365 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 28, 1974. A petition for rehearing was denied on October 16, 1974 (Pet. App. C). On November 12, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 15, 1974 (a Sunday). The petition was filed on December 16, 1974,

and was granted on March 24, 1975 (App. 56). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness must be advised in some manner, prior to testifying, of his Fifth Amendment privilege against compelled self-incrimination; and, if so, whether such a defendant is entitled to complete *Miranda* warnings.

2. Whether every grand jury witness against whom the government has incriminating evidence at the time he is called to testify is a "putative defendant."

3. Whether, if a warning of some sort is required, the government's failure to give adequate warning to a "putative defendant" should result in the suppression of his testimony in a subsequent prosecution for perjury.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

2. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *

STATEMENT

1. In late March 1973, Alfonso Cavalier, an officer with the San Antonio, Texas, Police Department assigned to the Office of Drug Abuse Law Enforcement, received information that respondent was dealing in narcotics (App. 47–48). Cavalier thereupon met respondent at a bar at approximately 1:30 p.m. on March 29 and discussed with him the purchase of one ounce of heroin (App. 47–49). Respondent then made several telephone calls in an effort to procure the heroin (App. 49–50). When his initial efforts proved unsuccessful, he told Cavalier that he would need money in order to obtain the heroin. Cavalier then gave him $650, whereupon respondent left the bar for approximately one hour (App. 49). Upon his return, respondent told Cavalier that he could procure the heroin later that evening when his regular connection appeared at the bar. Respondent returned the money and asked Cavalier to telephone him later that evening to make final arrangements for the sale (App. 49). When Cavalier telephoned the lounge that evening, however, he was unable to reach respondent

578—801—75——2

(App. 49). Because the heroin transaction never occurred, Officer Cavalier did not file a report of these events at the time (App. 51).

Cavalier subsequently informed the government prosecutor, who was seeking witnesses with possible knowledge of narcotics traffic in the San Antonio area to testify before a special grand jury then in session, that respondent would be an appropriate grand jury witness (App. 51). Cavalier told the prosecutor about the aborted heroin transaction and noted that respondent had a regular source for heroin and that respondent was apparently aware of several other sources whom he had attempted to call (App. 45). Accordingly, the prosecutor determined that respondent might be able to provide the grand jury with valuable information about local narcotics traffic (App. 45). As he later testified, however, the prosecutor then had no intention of seeking to indict respondent, at least in part because the prosecutor did not consider an indictable offense to have been committed (App. 42, 44).

2. Respondent appeared before the grand jury on May 2, 1973 (App. 2). At the outset, the following colloquy occurred (App. 5–6):

> Q. * * * Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A. Do I answer all the questions you ask?
>
> Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

> A. Yes, sir.
>
> Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?
>
> A. Yes, sir.
>
> Q. Have you discussed your presence here with anybody?
>
> A. My wife.
>
> Q. Have you contacted a lawyer in this matter?
>
> A. No, sir, I haven't.
>
> Q. I take that to mean then that you do not wish the services of a lawyer here today?
>
> A. I don't have one. I don't have the money to get one.
>
> Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.
>
> A. Yes, sir.
>
> Q. Is that clear?
>
> A. (Nod affirmative).

In order to lay the foundation for broader questions designed to elicit the names of drug traffickers with whom respondent may have had dealings and to gauge the truthfulness of subsequent responses to those broader questions (App. 45–46), the prosecutor first asked respondent if he had ever used heroin or

sold it. Respondent admitted to having used heroin in the past, but stated that he had not used it for approximately four months (App. 13–14). He denied that he had sold heroin since about 1960, when he had been convicted for a narcotics offense (App. 12, 15). The prosecutor then asked respondent if he had discussed the sale of heroin with anyone during the past year and if anyone had ever asked to buy one or more ounces of heroin from him. Respondent denied involvement in any discussion related to the purchase of heroin (App. 15–16). He admitted, however, that when he was addicted he had purchased heroin approximately four times daily in the local area (App. 17), but he denied knowing the names of any local heroin traffickers other than a person named Juan (App. 18–19). Respondent was again asked if he had talked to anyone about selling heroin during the past year and if anyone had given him money to buy heroin (App. 19–20). He denied having had any such discussion or receiving any money (*ibid.*). When asked if he would be able to purchase an ounce of heroin if he had $650, respondent stated that he could not, and that he would not even try to purchase it (App. 20). The prosecutor then stated that according to his information respondent could tell the grand jury more than he had thus far told them about the local heroin business. He asked respondent if he would reveal anything further about local dealers; respondent denied any further knowledge (App. 20–21).

3. The prosecutor subsequently informed Cavalier that he was considering whether to seek an indictment charging respondent with perjury before the grand

jury and needed further details of Cavalier's unsuccessful effort to purchase heroin from respondent in March. Accordingly, on June 4, 1973, Cavalier prepared a report detailing his dealings with respondent (App. 51). Because the prosecutor was uncertain as to whether it was appropriate to draw a perjury indictment against respondent in one or three counts, he reviewed the facts outlined in the report with another government attorney, who then suggested the possibility of charging respondent with an attempt to distribute narcotics in violation of 21 U.S.C. 846 (App. 36).

The prosecutor thereupon decided to seek an indictment charging both offenses (App. 39), and, in a two-count indictment returned June 13, 1973, respondent was charged with having attempted to distribute heroin, in violation of 21 U.S.C. 846, and with having made false declarations before the grand jury, in violation of 18 U.S.C. 1623 (App. 2–4).[1]

4. Prior to trial, respondent moved to suppress his grand jury testimony (App. 23–25). After evidentiary hearings, the district court granted the motion, hold-

[1] The following testimony formed the basis for the false declaration charge (App. 3, 16, 20):

"Q. And you have never told anyone that you would try to get heroin to sell them?

"A. No, sir.

* * * * *

"Q. Have you talked to anyone about selling heroin to them during the last year?

"A. No, sir.

* * * * *

"Q. No one has ever given you any money * * * to go buy them heroin?

"A. No, sir."

ing that respondent had been a "putative" or "virtual" defendant when called before the grand jury and that he therefore had been entitled to full *Miranda* warnings prior to testifying (Pet. App. D, pp. 36A–38A).[2] The district court noted that although a grand jury subpoena is not inherently coercive, respondent was nevertheless subject to custodial interrogation, since he may have perceived himself to be under an apparent compulsion to testify (Pet. App. D, p. 40A).[3]

The court of appeals affirmed, adopting the finding of the district court that respondent was a "virtual or putative defendant" when he appeared before the grand jury and agreeing with the district court that such a "putative defendant" is entitled to full *Miranda* warnings (Pet. App. A, pp. 5A–6A, 12A). The court of appeals construed the district court's finding as

[2] Respondent's motion to suppress was considered jointly with a motion raised under similar circumstances and granted by the district court in *United States* v. *Rangel*, 365 F. Supp. 155 (W.D. Tex.), affirmed, 496 F. 2d 1059 (C.A. 5). In *Rangel*, however, the warning giving the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. Because these factual circumstances arguably raised a question whether Rangel may in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege, and because Rangel's case did not present any different and important facet of the issues raised by the instant case, we did not petition in his case.

[3] Respondent was subsequently tried and convicted on the drug charge. His grand jury testimony was not used in that case. His conviction was affirmed by the court of appeals in a separate opinion. *United States* v. *Mandujano*, 499 F. 2d 370 (C.A. 5), and certiorari was denied, 419 U.S. 1114.

establishing that the government had, at the time of respondent's appearance before the grand jury, focused on respondent as "someone whom the government had knowledge of having committed a crime, as a person whom the government had planned to indict as it had one eye on prosecution, and against whom it was gathering incriminating evidence" (Pet. App. A, p. 7A). Finding the warnings given respondent to be inadequate, the court reasoned (Pet. App. D, p. 30A) that the prosecutor's conduct "smack[ed] of entrapment," since it might easily be inferred that the prosecutor was primarily "baiting" respondent to commit perjury, and was therefore "unfair" (Pet. App. A, p. 15A). The court concluded that the entire proceeding violated respondent's due process rights under the Fifth Amendment (Pet. App. A, p. 19A) and therefore agreed with the district court that respondent's allegedly perjurious grand jury testimony should be suppressed.

SUMMARY OF ARGUMENT

The decision of the court of appeals turns upon three conclusions, each of which must be correct in order to support suppression of respondent's allegedly perjurious grand jury testimony: (1) that "putative defendants" should be given full *Miranda* warnings before testifying to a grand jury; (2) that respondent was a putative defendant; and (3) that his testimony was properly suppressed for use in a prosecution based upon its alleged falsity. We contend that the court erred in its disposition of each of these three issues.

1. Neither the interrogation of persons suspected of crime nor the use in evidence of incriminating admissions by a defendant is prohibited by the Fifth Amendment privilege against compelled self-incrimination. Moreover, the requirement of *Miranda* that interrogation be preceded by a full advice of rights is not itself an ingredient of the constitutional privilege but a prophylactic measure designed to neutralize the inherently coercive atmosphere perceived by the *Miranda* majority in the process of incommunicado custodial police interrogation. The fatal flaw in the court of appeals' inquiry into the applicability of *Miranda's* warning requirements to "putative defendants" called before a grand jury lies in the court's failure to consider the terms of the constitutional provision itself, particularly the requirement that there be compulsion of testimony in order to bring the privilege into play.

The salient features of incommunicado police interrogation, outlined at considerable length in the *Miranda* opinion, are markedly different in their potential for overbearing the will of the individual from the characteristics of grand jury questioning. The latter takes place before 23 private citizens, and the proceedings are often recorded, as they were here. The opportunities for use of physical force, threats, or trickery to overcome a witness's determination not to testify are thus virtually non-existent. Accordingly, it has long been recognized by this Court that a grand jury witness must claim the privilege "or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*,

317 U.S. 424, 427. Nothing in this Court's subsequent Fifth Amendment jurisprudence casts any doubt upon the continuing validity of that proposition.

Moreover, the "putative defendant" notion is not useful in making the critical constitutional inquiry into compulsion. The presence or absence of impermissible compulsion is a determination that turns upon the state of mind of the individual, upon the question whether, in the circumstances, it is likely that his will was overborne. If grand jury questioning is to be equated with incommunicado police interrogation as inherently coercive, it is difficult to see why it is more coercive of "putative defendants" than of other witnesses. Indeed, the "putative defendant" concept is not central to the administration of *Miranda* either, since all subjects of custodial police interrogation are entitled to the warnings.

In the present case, respondent was advised prior to testifying that he was not required to supply answers that would tend to incriminate him. If any warning is required to support the voluntariness of grand jury testimony, this, we submit, was a fully accurate and constitutionally adequate statement of respondent's rights. Moreover, the *Miranda* warnings, while appropriate to accomplish their prophylactic objective in the context of police interrogation, are inaccurate in two respects as applied to a grand jury witness. First, and most important, no grand jury witness has an absolute right to remain silent (conversely, no person, whether or not in custody, is obliged to respond to police inquiries). It is the grand jury's function and preroga-

578-801—75——3

tive to obtain answers to questions relating to its investigations into crime, and it is the duty of every citizen to answer the grand jury's inquiries unless he asserts a timely and colorable claim of potential self-incrimination or other testimonial privilege. Nor, from the standpoint of the policies repeatedly enunciated by this Court regarding the role of the grand jury, is it desirable to supply grand jury witnesses with inaccurate and overbroad statements of rights for the purpose of discouraging them from voluntarily testifying.

Similarly, the Constitution does not confer upon unindicted grand jury witnesses a right to appointed counsel, *In re Groban*, 352 U.S. 330, 332–333, and the "putative defendant" standard has recently been rejected in delimiting the scope of the Sixth Amendment right to counsel, *Kirby* v. *Illinois*, 406 U.S. 682. And even if respondent had a right to appointed counsel, the failure to apprise him of such a right could not, in the grand jury context, sufficiently impair the voluntariness of his testimony to establish a violation of the privilege against compelled self-incrimination. This is particularly true in the present case: although the precise words of the *Miranda* formula were not recited, respondent was clearly told to tell the government attorney if he felt a need to consult with counsel.

2. The courts below also erred, we submit, in their determination that respondent was in fact a "putative defendant" at the time he was called before the grand jury. The attorney who conducted the grand jury proceedings testified unequivocally that he had no intention of indicting respondent on drug charges at the time respondent appeared before the grand jury—indeed, he was not even then aware that respondent's activities, as known to the government, constituted an indictable offense. He called respondent because his knowledge of respondent's activities afforded him good reason to believe that respondent could identify persons involved in heroin trafficking in the San Antonio area; and he questioned respondent regarding the known transaction with the undercover agent as a logical introduction to his proposed further line of questioning about the activities of others.

The courts below rejected this explanation, relying instead upon the fact that, although the attorney may not have known it, the information in his possession regarding the incident, to which he alluded in his questioning of respondent, did constitute a sufficient basis for charging respondent with a crime. We submit that it is improper to rely solely upon such an "objective" standard in identifying those grand jury witnesses who should be classified as "putative defendants" entitled to special rights in connection with their grand jury appearance. Such a standard creates grave difficulties for attorneys conducting grand jury proceedings, since they cannot be guided by their subjective prosecutive intentions but must instead hazard a guess as to the likely assessment by an unknown future court.

Moreover, it is common to call as grand jury witnesses individuals who are known or suspected to

be involved in or at the fringes of the criminal activity under investigation (such persons are, after all, likely to be in the best position to supply relevant evidence); it is also common in the case of most such witnesses, for a variety of reasons, that there is no intent to prosecute, particularly if they are cooperative with the grand jury. The effective functioning of the grand jury would be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses. Accordingly, if there is to be a "putative defendant" criterion, it is imperative that it be defined principally on the basis of the actual (*i.e.,* subjective) prosecutive intent of the government at the time the witness appears.

3. Even if respondent's privilege against compelled self-incrimination was violated by the administration of insufficient warnings, suppression of his allegedly false testimony in this perjury prosecution was inappropriate. It is well established that witnesses may not avoid improper testimonial compulsion by false swearing. *E.g., Glickstein* v. *United States,* 222 U.S. 139; *United States* v. *Knox,* 396 U.S. 77. Perhaps in an effort to avoid the impact of this doctrine, the court of appeals characterized the summoning and interrogation of respondent as a violation of due process requirements, being of the view that it was inherently unfair to put respondent in a position in which his only wise course appeared (to the court) to be silence, and in which his alternatives to silence were perjury or self-incrimination.

The court's due process rationale overlooks the long line of pre-*Miranda* decisions of this Court dealing with the problem of identifying the kind of interrogation of suspects that offends due process notions. Normal questioning of grand jury witnesses, such as that to which repondent was here subjected, does not begin to approach the outermost boundaries of those due process concepts. Moreover, we submit, it is simply not offensive to any reasonable concept of fairness to call a witness to testify before the grand jury, even one whom the grand jury may indict, unless such witness is compelled to testify by force, threat, or trick. The Constitution contains no policy against voluntary admissions of criminal activity, and frank cooperation with the grand jury may in fact often avert indictment. Moreover, a "putative defendant" may be able to exonerate himself to the satisfaction of the grand jury by his testimony. In any event, we reiterate, it is important to the success of the grand jury's mission (particularly in investigations of matters such as narcotics trafficking or official corruption) that those most knowledgeable about such activities disclose their knowledge to the grand jury, and the voluntary cooperation of such witnesses should be encouraged, not discouraged.

The court of appeals also suggested that the questioning of respondent "smack[ed] of entrapment." However, the concept of entrapment articulated by this Court provides no support whatever for suppression of respondent's testimony. Entrapment exists

only when the government implants in the mind of an innocent person the disposition to commit an offense. Any suggestion that the government here overcame a predisposition on the part of respondent to tell the truth is utterly without foundation.

Finally, even if the questioning of respondent was improper, this is not the kind of impropriety for which the drastic remedy of evidentiary suppression is necessary or appropriate. There is no reason to suppose that any rules that may be announced by the courts regarding the obligations of government attorneys toward grand jury witnesses will be widely ignored or disobeyed, or that other, less drastic responses are not available to deal with instances of disobedience. Moreover, even if it were posited that exclusionary measures are required to assure compliance with such rules, there would be little incremental deterrent effect to be gained from extension of the exclusionary remedy beyond suppression of incriminating testimony to suppression of perjurious testimony. And, in conclusion, the exclusionary remedy is particularly inappropriate in this case, since at the time of respondent's grand jury appearance there were no federal appellate holdings requiring administration of the kinds of warnings found to be required by the court of appeals.

ARGUMENT

The decision of the court of appeals is built on three components, each of which is necessary to the result reached: (1) that a putative defendant may not be called to testify before a grand jury without being

given full *Miranda* warnings, and, by necessary implication, that such an individual has an absolute right to remain silent (*i.e.*, to refuse to give any testimony whatsoever, whether or not incriminating) and also a right to appointment of counsel (discussed in Part I, *infra*); (2) that respondent was, at the time he was called to testify before the grand jury, a "putative defendant" (discussed in Part II, *infra*); and (3) that it is appropriate to suppress the perjurious testimony of a putative defendant who has not been given full *Miranda* warnings (discussed in Part III, *infra*). If the court was mistaken in any of these conclusions, reversal must follow; we contend herein that each conclusion was in error.

I. A "PUTATIVE DEFENDANT" CALLED AS A GRAND JURY WITNESS IS NOT ENTITLED TO BE WARNED OF HIS RIGHTS, AND THE RIGHTS OF SUCH A WITNESS INCLUDE NEITHER AN ABSOLUTE RIGHT TO REMAIN SILENT NOR A RIGHT TO APPOINTMENT OF COUNSEL

Of the three components of the court of appeals' decision, the most significant in terms of its potential impact upon the functioning of our criminal justice system is the holding that putative defendants are entitled to *Miranda* warnings and, perforce, to a far broader right of silence in the face of grand jury inquiry than that conferred by the self-incrimination provision of the Fifth Amendment alone. While the chain of reasoning leading to this conclusion and the constitutional basis from which it is derived are not expressly articulated in the opinion, it seems apparent that the conclusion was rooted to some extent in both

the self-incrimination privilege (Pet. App. A, p. 15A) and the due process requirement (Pet. App. A, p. 19A).

The most pervasive theme sounded in the court of appeals' opinion is that it is unfair and perhaps even improper to call persons to testify before the grand jury when the government has evidence suggesting that such persons may be subject to criminal prosecution and when the interrogation is likely to encompass inquiry into areas where truthful responses could prove incriminating. The same attitude is manifest in the court of appeals' opinion in *United States* v. *Wong,* C.A. 9, No. 74–1636, decided September 23, 1974, petition for writ of certiorari pending, No. 74–635. The remedy prescribed for this perceived impropriety is the giving of full *Miranda* warnings.

At bottom would appear to be the notion that it is probably unwise for persons in the position of Mandujano and Wong to do anything other than invoke their testimonial privilege (Pet. App. A, p. 11A), and that steps should be taken to discourage such witnesses from responding fully to inquiry before the grand jury. It is somewhat doubtful that the giving of full *Miranda* warnings would accomplish this objective in most cases. To the extent that it would have such an effect, however, we submit that the functioning of the grand jury would thereby be seriously impaired without doing real service to the enhancement of constitutional rights. As will be discussed further below (pp. 44–45, 52–53, *infra*), the fruitfulness of a grand jury's inquiry will often depend on its ability to secure information from persons having knowledge

of the type of criminal activity under investigation. Of necessity, such knowledge is most often possessed by those who themselves are involved in or at the fringes of such activities (and who therefore are most likely to fall within the "putative defendant" category). This is especially true in the case of grand juries undertaking broad investigations into as yet undisclosed criminal activity (*e.g.,* the investigation of narcotics trafficking in the San Antonio area by the grand jury before which respondent appeared, or the investigation of police corruption in San Francisco by the grand jury before which Ms. Wong appeared). Truthful testimony by "putative defendants" having knowledge of such activities is often vital to the success of the inquiry and should, so long as it is not the product of improper compulsion or trickery, be assiduously encouraged.

A. THE FAILURE EXPRESSLY TO ADVISE A "PUTATIVE DEFENDANT" OF HIS SELF-INCRIMINATION PRIVILEGE DOES NOT IMPERMISSIBLY COMPEL HIS TESTIMONY IN VIOLATION OF THE FIFTH AMENDMENT

Prior to asking respondent questions, the government attorney managing the grand jury carefully warned him that "[y]ou don't have to answer questions which would incriminate you" (App. 6). We submit that this advice represented an accurate and fully adequate (although constitutionally unnecessary) articulation of respondent's Fifth Amendment rights in the grand jury proceeding. While it is common practice for government attorneys to administer such warnings to grand jury witnesses who are suspected of involvement in the criminal activity under investi-

578-801—75——4

gation, we do not believe that the Fifth Amendment requires their administration, and thus a failure to warn even to this extent entails no violation of constitutional rights. Even in the *Miranda* context of incommunicado custodial interrogation, warnings are not something required by the Fifth Amendment itself, but are simply "prophylactic standards" designed to safeguard the privilege on occasions when it was deemed to be singularly threatened. *Michigan* v. *Tucker,* 417 U.S. 433, 446.

Insofar as the inquiry in a case focuses upon the scope and implementation of the constitutional privilege, first principles dictate that heed be paid to the language by which the privilege is expressed. The self-incrimination clause is directed against "compelled" testimony, and the threshold jurisprudential obligation thus is to consider whether there has been "genuine compusion of testimony" (*id.* at 440) or "compulsion sufficient to breach the right against compulsory self-incrimination" (*id.* at 445). The questioning of respondent before the grand jury entailed no compulsion of this kind and thus in no way invaded his constitutional rights.

The court of appeals' conclusory assertion that the Fifth Amendment requires that "putative defendants" appearing as witnesses before the grand jury be given *Miranda* warnings prior to testifying is predicated upon a false analogy between the status of such witnesses and the situation of an arrested suspect during incommunicado police interrogation (whose responses are presumed by the courts to have been coerced ab-

sent express warning and waiver of rights). The analogy fails for two reasons: (1) the presumption adopted by this Court as the basis for its ruling in *Miranda*—that incommunicado custodial police interrogation is inherently coercive (*Kirby* v. *Illinois,* 406 U.S. 682, 688)—is simply inapplicable to the grand jury setting; and (2) a witness's answers before the grand jury are no more likely to be compelled (in a constitutionally significant sense) if he is suspected of involvement in criminal activity of the sort the grand jury is investigating than if he is not.

1. A grand jury setting is not inherently coercive

While the privilege against compulsory self-incrimination applies to proceedings before a grand jury, *Counselman* v. *Hitchcock,* 142 U.S. 547, there is no basis in the logic or history of the Fifth Amendment for requiring government attorneys to administer a set of preliminary warnings to any grand jury witness.

The Fifth Amendment speaks of compulsion. "It does not preclude a [grand jury] witness from testifying voluntarily in matters which may incriminate him." *United States* v. *Monia,* 317 U.S. 424, 427. On the contrary, a grand jury witness "must claim * * * [the privilege] or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Id.* at 427. Nor does failure to advise of rights make subsequent testimony any less voluntary. "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances * * *. [T]he fail-

ure * * * to advise * * * [of] rights * * * [is] not in and of [itself] determinative." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226–227.[4]

It is the particular nature and setting of incommunicado police interrogation that tends to create, in this Court's view, so great a danger of compulsory self-incrimination as to require "practical reinforcement" (*Michigan* v. *Tucker,* 417 U.S. 433, 444) of the privilege through the procedural safeguard of explicit warnings (*Miranda* v. *Arizona,* 384 U.S. 436). But the police interrogation environment contrasts sharply with the nature of the grand jury and the setting in which grand jury questioning occurs. In a grand jury investigation, to an even greater degree than in a normal consent search, "there is no evidence of any in-

[4] Indeed, most courts that have considered the issue have concluded that no grand jury witness, including a potential or "putative" defendant, is entitled to express Fifth Amendment warnings prior to testifying. See, *e.g., United States* v. *Scully,* 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo,* 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *DiMichele,* 375 F. 2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; *Commonwealth of Pennsylvania* v. *Columbia Investment Corp.,* 325 A. 2d 289 (Pa. Sup. Ct.); *State ex rel. Lowe* v. *Nelson,* 202 So. 2d 232 (Fla. Ct. App.). But see *United States* v. *Luxenberg,* 374 F. 2d 241, 246 (C.A. 6); *United States* v. *Wong, supra; State* v. *Iverson,* 187 N.W. 2d 1, 16 (N.D. Sup. Ct.). The District of Columbia Court of Appeals has recently held that a "putative defendant" must be given *Miranda* warnings before appearing in the grand jury room for questioning and must also be informed that he is considered to be a "putative defendant." *United States* v. *Washington,* 328 A. 2d 98, 99–100 (D.C. Ct. App.), petition for a writ of certiorari pending, No. 74–1106.

herently coercive tactics—either from the nature of the * * * questioning or the environment in which it [takes] place. Indeed, * * * the specter of incommunicado police interrogation in some remote station house is simply inapposite." *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 247.

Even a brief glimpse at the *Miranda* opinion reveals how different grand jury questioning is from the factors that troubled the Court in *Miranda.* As that opinion noted, the danger of compulsion during police interrogation arises principally from the fact that the interrogation occurs in private. "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation'" (384 U.S. at 449; emphasis in original). Privacy is "essential to prevent distraction and to deprive [a suspect] of any outside support" (*id.* at 455). The police may then "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (*ibid.*). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion over long periods of time (*ibid.*).

Indeed, as this Court also recognized in *Miranda,* "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery" (*id.* at 461). By contrast to the incommunicado setting in which police interrogation occurs,

grand jury questioning takes place in the presence of no fewer than 16 private citizens (Rule 6 (a), Fed. R. Crim. P.) who——

> bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. *It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.* [*In re Groban,* 352 U.S. 330, 346–347 (Black, J., dissenting; emphasis supplied).]

Moreover, grand jury questioning is at all times under the supervision of a presiding judge, and a transcript is often made of the proceedings (as was done in the instant case). Accordingly, there is little if any likelihood that a government attorney who questions a witness on behalf of the grand jury could resort to any of the coercive tactics potentially employable by police officers during incommunicado police interrogation. Nor, unlike police interrogation where "[p]rivacy results * * * in a gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (*Miranda, supra,* 384 U.S. at 448), is there the possibility that—should coercive tactics be employed during grand jury questioning—it may go undetected and be unreviewable on a subsequent claim that the privilege was violated.

Nor does compliance with a subpoena to testify before the grand jury deprive a person of "his freedom of action in any significant way"—a factor that

the Court in *Miranda* construed to be a hallmark of "custody" since it is the "point that our adversary system of criminal proceedings commences" (384 U.S. at 477; but cf. *Kirby* v. *Illinois, supra*). To the contrary, as this Court noted in *United States* v. *Dionisio,* 410 U.S. 1, 10:

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" * * *. "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." [Citations omitted.]

Moreover, the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and decide to what extent (if at all) he will respond to questioning. In addition, he can refuse compliance and subsequently contest the legality of a subpoena in a show cause hearing. *United States* v. *Ryan,* 402 U.S. 530, 533; *Cobbledick* v. *United States,* 309 U.S. 323. And, after he has appeared, he is free to resume his daily activities. See *United States* v. *Calandra,* 414 U.S. 338, 343.[5]

---

[5] It has generally been recognized heretofore that in responding to a grand jury subpoena a witness is not placed in "custody." See, *e.g.*, *United States* v. *Binder,* 453 F. 2d 805, 809

Finally, in its attempt to equate a grand jury investigation to custodial police interrogation, the court of appeals utterly failed to recognize the vast difference in history and function of the two processes. The institution of the grand jury—unlike custodial police interrogation—is deeply rooted in Anglo-American history, serving for centuries "both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." *United States* v. *Calandra,* 414 U.S. 338, 343. The founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. *Costello* v. *United States,* 350 U.S. 359, 361–362.

The grand jury's historic functions survive to this day. "Its responsibilities continue to include * * * the protection of citizens against unfounded criminal prosecutions," *United States* v. *Calandra, supra,* 414 U.S. at 343, and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement" (*ibid.*). See also *Branzburg* v. *Hayes,* 408 U.S. 665, 686–700. Indeed, precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long-

(C.A. 2); *Gollaher* v. *United States*, 419 F. 2d 520 (C.A. 9), certiorari denied, 396 U.S. 960; *Kitchell* v. *United States*, 354 F. 2d 715 (C.A. 1); *United States* v. *Capaldo*, 402 F. 2d 821 (C.A. 2); *Jones* v. *United States*, 342 F. 2d 863 (C.A.D.C.)

standing principle that 'the public * * * has a right to every man's evidence' * * * is particularly applicable to grand jury proceedings" (*Branzburg* v. *Hayes, supra,* 408 U.S. at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his government. *Blackmer* v. *United States,* 284 U.S. 421, 438.

The court of appeals imposes on this constitutional process the administration of a set of warnings—"not themselves rights protected by the Constitution" (*Michigan* v. *Tucker, supra,* 417 U.S. at 444)—that are likely to discourage citizens from providing the grand jury with information it needs to carry out its functions under the Fifth Amendment (it is, after all, the premise of the court's decision that the witness who has been warned will be less likely to testify fully and freely). The *Miranda* warnings, however, were never intended to create "a constitutional straitjacket" (*Miranda, supra,* 384 U.S. at 467) to be applied across the board to every form of official questioning. The words of the Court in delimiting its holding in that opinion are especially pertinent with regard to its inapplicability to grand jury proceedings (*id.* at 477–478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling

atmosphere inherent in the process of in-custody interrogation is not necessarily present.[6]

The court of appeals' blanket requirement that every so-called "putative defendant" be given *Miranda* warnings prior to testifying before the grand jury is, moreover, predicated upon difficult forecasts about who is apt to be indicted (see Part II, *infra*). Yet as this Court stated in *Blair* v. *United States*, 250 U.S. 273, 282: "[T]he scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation * * *."

2. Grand jury questioning is no more coercive when the witness is a "putative defendant" than it is otherwise

The fact that a grand jury witness is suspected of involvement in criminal activity of the sort under investigation by the grand jury (and is thus, under the definition of the courts below, a "putative defendant") has no constitutionally significant bearing on the question whether his testimony has been compelled in violation of the Fifth Amendment.

---

[6] The Court in *Miranda* underscored its distinction between incommunicado police interrogation, necessitating *Miranda* warnings, and "general questioning of citizens in the fact finding process," by reference to the opinion of a Scottish court which noted that while "'[i]n former times such questioning * * * would be conducted by police officers visting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend, * * * [the modern practice of interrogation at the station house] must normally create a situation very unfavourable to the suspect.' *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J.C.)." (384 U.S. at 478, n. 46).

Indeed, the court of appeals' opinion gives no indication of why or how "putative defendant" status bears on the question of compulsion. The opinion simply adverts to the line of Fifth Circuit cases indicating that such status is pertinent in determining whether police interrogation of a suspect is "custodial" so as to require administration of *Miranda* warnings (Pet. App. A, p. 9A). No doubt the "virtual defendant" concept is useful in determining whether, in an otherwise ambiguous factual context, a particular police-citizen contact amounts to an arrest. But its utility for the purpose of evaluating such incidents and attaching legal significance to ambiguous facts hardly establishes its relevance to the question whether grand jury questioning of such witnesses is inherently coercive and, if so, whether the administration of *Miranda* warnings is a suitable remedy to counteract the coercion.

In fact, we submit that a witness's answers before the grand jury are no more likely to be compelled because he is suspected of involvement in the criminal activities that the grand jury is investigating than if he is not. Such a person may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other witness who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *.'" *Michigan* v. *Tucker*, *supra*, 417 U.S. at 439.

To be sure, one suspected of involvement in the type of criminal activity under investigation faces a greater likelihood that he will be asked questions calling for responses that may be incriminating. But that fact alone has no bearing upon the voluntariness of the responses. "The obligation to appear [before the grand jury] is no different for a person who may himself be the subject of the grand jury inquiry." *United States* v. *Dionisio,* 410 U.S. 1, 10, n. 8. Once called, his responses are presumed to be as voluntary as those of any other witness.

Even in the *Miranda* context of police interrogation, the "putative defendant" concept is irrelevant in defining the right to warnings. If the police arrest a citizen and take him to the stationhouse for interrogation, he is entitled to *Miranda* warnings even if the police have no basis for suspecting him of a crime and no intent to prefer charges against him.

Nor is a grand jury witness against whom the government has incriminating evidence thereby "in custody" or otherwise "deprived of his freedom of action in any significant way" to a greater extent than a normal grand jury witness. Our adversary system of criminal proceedings is triggered by discrete governmental procedures, such as arrest or indictment, that impose particular restraints distinct from the kind of restraints imposed upon all citizens as a result of their obligations of citizenship. Cf. *Escobedo* v. *Illinois,* 378 U.S. 478, 490–491.

The government's mere knowledge or intention with regard to a particular individual, unaccompanied by any action or procedure that treats him differently

from other individual with whom the government deals—such as other grand jury witnesses who are called to testify because they also are likely to possess information useful to enable the grand jury to fulfill its constitutional function—does not itself initiate criminal proceedings or result in "custody." Cf. *Kirby* v. *Illinois,* 406 U.S. 682, 689. "The test [for determining "custody"] must be an objective one. Clearly the Court [in *Miranda*] meant that *something* more than official interrogation must be shown. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source." *United States* v. *Hall,* 421 F. 2d 540, 544 (C.A. 2) (Friendly, J.; emphasis in original); see also *Lowe* v. *United States,* 407 F. 2d 1391 (C.A. 9); *United States* v. *Sicilia,* 475 F. 2d 308 (C.A. 7).[7]

[7] The "focus" rationale employed by the court of appeals may derive from *Escobedo* v. *Illinois,* 378 U.S. 478, 490–491, where the Court held that the fact that "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" was *one* factor to be considered in ascertaining whether the accused had been denied the assistance of counsel in violation of the Sixth Amendment. In *Miranda* this Court clarified what it meant by the "focus" concept: "what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused" was the objective reality of "custody" or "[deprivation] of * * * freedom * * * in any significant way" (*Miranda, supra,* 384 U.S. at 444 and n. 4). See also Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?,* 25 S. Cal. L. Rev. 699 (1974). Moreover, *Escobedo* is not to be extended beyond its particular facts, *Michigan* v. *Tucker, supra,* 417 U.S. at 438, and is clearly inconsistent with more recent views of the subject, *e.g., Kirby* v. *Illinois, supra.*

B. THE *MIRANDA* WARNINGS, COMPRISING A "RIGHT TO REMAIN SILENT" AND A RIGHT TO APPOINT COUNSEL, ARE INAPPROPRIATE TO A GRAND JURY INVESTIGATION

Even assuming that respondent was constitutionally entitled to the warning that he in fact received prior to testifying before the grand jury, informing him of his right not to answer questions if the answers would tend to incriminate him, he was constitutionally entitled to no more.[8] The court of appeals' requirement

We do not argue here that a defendant who has already been indicted for a crime or against whom an information or complaint has been filed need not be advised of his privilege against self-incrimination prior to testifying before the grand jury. It may well be that in these circumstances, where the criminal process has already commenced, the Fifth Amendment requires certain special procedural safeguards. Several courts have made this distinction. See, *e.g.*, *United States* v. *Scully*, *supra*; *Perrone* v. *United States*, 416 F. 2d 464, 466 (C.A. 2); *Jones* v. *United States*, 342 F. 2d 863, 870 (C.A.D.C.); *Mulloney* v. *United States*, 79 F. 2d 566, 579 (C.A. 1).

[8] Among the courts that have required that a "putative defendant" before the grand jury be given some Fifth Amendment warning, there has been significant variation as to precisely how much warning is appropriate. Although the Sixth Circuit has suggested that "putative defendants" should be warned prior to testifying before the grand jury of their privilege against compulsory self-incrimination, in no case has the Sixth Circuit intimated that any blanket "right to remain silent" or right to consult with appointed counsel should be available (see *United States* v. *Luxenberg*, *supra*; *Stanley* v. *United States*, 245 F. 2d 427, 434). The Ninth Circuit, in *United States* v. *Wong*, *supra*, required only that the "putative defendant" be apprised of a "right to remain silent" and did not advert to a right to counsel. The District of Columbia Court of Appeals, in *United States* v. *Washington*, *supra*, required, in addition to complete *Miranda* warnings, that the warnings be administered prior to the time that the putative defendant appears in the grand jury room for questioning and that he be informed that he is considered to be a "putative defendant."

that a "putative defendant" before the grand jury be given complete *Miranda* warnings reflects a totally inappropriate application to grand jury investigations of the rationale of *Miranda* and creates in effect two additional entitlements that have no foundation in Fifth Amendment logic or precedent: a "right to remain silent" before the grand jury, and a right to have access to appointed counsel during grand jury questioning.[9]

1. No witness appearing before a grand jury has a "right to remain silent" in response to any grand jury questions he does not wish to answer. Rather, he may claim his Fifth Amendment privilege against compulsory self-incrimination, but that is available only when it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States*, 341 U.S. 479, 486–487; see also *United States* v. *Monia*, *supra*, 317 U.S. at 427; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273

[9] Respondent was also not advised in this case that his testimony could be used against him in future proceedings, perhaps because, according to the attorney who presented evidence to the grand jury, there was "no intent to present any indictment" against respondent at the time (App. 42). Unlike the "right" of silence and to appointed counsel, advice regarding possible future adverse use of respondent's testimony would have been an accurate statement of the law. For the reasons previously stated, however, it was not constitutionally necessary that respondent be so advised in order to preserve the voluntary quality of his testimony.

U.S. 103, 113; *United States* v. *Kordel,* 397 U.S. 1, 10. Nor is the witness's decision about the potentially self-incriminating nature of the question necessarily determinative. If the court decides that he has improperly invoked the privilege, he must nevertheless answer the question. *Hoffman, supra;* cf. *Maness* v. *Meyers,* No. 73–689, decided January 15, 1975. And even if he has properly invoked the privilege, he may nevertheless be compelled to respond, under penalty of contempt, if the court grants him immunity coextensive with the privilege. *Kastigar* v. *United States,* 406 U.S. 441. Moreover, once he proffers an incriminating fact, he cannot then refuse to testify further regarding details of that fact. *Rogers* v. *United States,* 340 U.S. 367, 373.[10]

Strictly speaking, indeed, the privilege against compulsory self-incrimination does not entail an across-the-board "right to remain silent" in any context. Rather, it has been thought necessary, in order to safeguard the privilege, to advise individuals of a "right to remain silent" during police interrogation, in part to counteract the possibility that a decision to speak about non-privileged matter in that setting could be used by the police (through trickery, cajolery or other incommunicado tactics) as a means of eliciting incriminating matter (see *Miranda, supra,* 384 U.S. at 476–477). Realistically, the "right to remain silent" is, in this context, simply a recognition that the police (in contrast to grand juries) are not empowered in our legal system to demand that citizens respond to their inquiries. This "right to remain silent" in the face of police interrogation, moreover, is by no means confined to "putative defendants" but extends to the most upright and law-abiding citizen as well.[11]

[10] Moreover, the decisions of this Court are explicit in holding that the privilege "is solely for the benefit of the witness" *United States* v. *Murdock*, 284 U.S. 141, 148, and "is purely a personal privilege of the witness." *Hale* v. *Henkel*, 201 U.S. 43, 69. A refusal to answer cannot be justified by a desire to protect others from punishment, *Brown* v. *Walker*, 161 U.S. 591, much less to protect another from interrogation by the grand jury, *Rogers* v. *United States*, *supra*, 340 U.S. at 371.

The court of appeals' equation of the grand jury with the police in this context, aside from being at sharp odds with Court precedent, is also unjustifiable as a matter of constitutional policy. It materially undermines the grand jury's legitimate power of investigation and gives witnesses such as respondent, who possess information material to the grand jury's investigation, the power effectively to block or impede the grand jury's inquiry into non-privileged matter. In the grand jury's context the privilege against compulsory self-incrimination traditionally stands as an exception to the 'longstanding principle that 'the public * * * has a right to every man's evidence.' " *Branzburg* v. *Hayes, supra,* 408 U.S. at 688. Indeed, "[t]he duty to testify may on occasion be burden-

[11] Similarly, a defendant's right not to take the stand at his trial on criminal charges derives from the possibility that his invocation of the privilege as to particular questions might permit the jury to draw an ineradicably prejudicial inference of guilt (see *United States* v. *Scully*, *supra*, 225 F. 2d at 115–116). Neither of these special considerations is present in the context of a grand jury investigation.

some and even embarrassing. It may cause injury to a witness' social and economic status," *United States* v. *Calandra, supra,* 414 U.S. at 345, yet the public's overriding interest in full disclosure before the grand jury may not be overborne except by a valid self-incrimination claim (or other recognized testimonial privilege). As this Court has repeatedly recognized, "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra, supra,* 414 U.S. at 344, citing *Branzburg* v. *Hayes, supra,* 408 U.S. at 700; *Costello* v. *United States,* 350 U.S. 359, 364.

2. While the opinion of the court of appeals never actually discusses the right of a "putative defendant" called before the grand jury to appointed counsel, it notes that respondent was not advised of that right (Pet. App. A, pp. 2A–3A and n. 1), and a determination that such a right exists is implicit in the holding that full *Miranda* warnings are a precondition to lawful interrogation. This conclusion too reflects an unwarranted and totally inappropriate application to grand jury investigations of the rationale of *Miranda,* where access of an arrested suspect to the advice of counsel prior to custodial interrogation was considered necessary to counteract the special hazards of compulsion found to be prevalent in that context. With those fears absent in the grand jury setting, for the reasons already discussed, gone too is the need for the special prophylactic measures prescribed by *Miranda.*

Before proceeding to a discussion of the broad legal issue posed by this aspect of the decision of the court of appeals, it is appropriate to note that, while re-

spondent was not told he could have appointed counsel in the precise words of the *Miranda* warning, he was told that he could halt the proceedings at any time if he felt the need to consult a lawyer (App. 6; emphasis supplied):

> Q. Have you discussed your presence here with anybody?
>
> A. My wife.
>
> Q. Have you contacted a lawyer in this matter?
>
> A. No, sir, I haven't.
>
> Q. I take that to mean then that you do not wish the services of a lawyer here today?
>
> A. I don't have one. I don't have the money to get one.
>
> Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. *Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.*
>
> A. Yes, sir.
>
> Q. Is that clear?
>
> A. (Nod affirmative).

It may be desirable as a matter of policy to provide grand jury witnesses who are potential defendants with appointed counsel if they cannot afford their own, but it is not constitutionally mandated.[12] To the

[12] Although there is considerable doubt that such a practice is authorized by statute (see note 14, *infra*), we understand that it is common practice in the federal system to appoint counsel for indigent grand jury witnesses requesting such assistance, and it seems likely that a request by respondent for appointment of counsel would have been honored.

contrary, this Court has recognized that the Constitution does not require that grand jury witnesses be represented by counsel (*In re Groban, supra,* 352 U.S. at 332–333):

> A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, * * * [although] evidence obtained may possibly lay a witness open to criminal charges. * * * Until [such charges are made] his protection is the privilege against self-incrimination. [Citations omitted.][13]

Miranda's creation of "a limited Fifth Amendment right to counsel" (*Miranda, supra,* 384 U.S. at 537, White, J., dissenting) during custodial police interrogation, where "circumstances * * * can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators" (*id.* at 469), is manifestly inapplicable to grand jury investigations, for the reasons already stated. Nor can such an alleged right of access to counsel during grand

[13] In rejecting claims of a right to counsel before the grand jury, courts generally have not distinguished between the presence of counsel in the grand jury room and access to counsel outside the room. See, *e.g.*, *Directory Services, Inc.* v. *United States*, 353 F. 2d 299 (C.A. 8); *Gollaher* v. *United States*, 419 F. 2d 520 (C.A. 9), certiorari denied, 396 U.S. 960; *In re Grumbles*, 453 F. 2d 119 (C.A. 3); *Harris* v. *Beto*, 438 F. 2d 116 (C.A. 5). A few courts, however, have expressly rejected the notion that the Fifth Amendment requires that a grand jury witness have access to counsel within or without the grand jury room. See *United States* v. *Daniels*, 461 F. 2d 1076 (C.A. 5); *United States* v. *DeSapio*, 299 F. Supp. 436, 440 (S.D. N.Y.).

jury investigations be found in the Sixth Amendment. While this Court initially embarked on a course that might ultimately have led to recognition of a Sixth Amendment right to counsel for "putative defendants" (see *Escobedo* v. *Illinois, supra*), it quickly abandoned that analysis in *Miranda* and has recently indicated that the Sixth Amendment right to counsel does not attach prior to "[t]he initiation of judicial criminal proceedings." *Kirby* v. *Illinois,* 406 U.S. 682, 689; *Michigan* v. *Tucker, supra,* 417 U.S. at 438."

Although there has been, since the decision in *Groban,* a considerable expansion of constitutionally recognized procedural rights of actual and even prospective criminal defendants, including the right to counsel at various post-arrest or post-indictment stages (*e.g., Hamilton* v. *Alabama,* 368 U.S. 52; *Mempa* v. *Rhay,* 389 U.S. 128), this Court has been at pains to make clear that these requirements are not automatically to be extended to the necessarily wide-ranging and traditionally non-adversarial grand jury context. See *Jenkins* v. *McKeithen,* 395 U.S. 411, 430; *Hannah* v. *Larche,* 363 U.S. 420, 449.

[14] While not conclusive of the constitutional question, we note that, unless a Sixth Amendment right to counsel has attached, a grand jury witness who is not under arrest and has not been formally charged has no right to appointed counsel under the Criminal Justice Act of 1964. See 18 U.S.C. 3006A(a). Moreover, Rule 6(d), Fed. R. Crim. P., expressly limits the persons who may be present while the grand jury is in session to "[a]ttorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device."

II. RESPONDENT WAS NOT A "PUTATIVE DEFENDANT" WHEN HE APPEARED BEFORE THE GRAND JURY, SINCE THE GOVERNMENT DID NOT THEN INTEND TO SEEK HIS INDICTMENT

Even assuming that a "putative defendant" is constitutionally entitled to complete *Miranda* warnings prior to testifying before the grand jury, we submit that the wrong standards were used by the courts below in defining who is a "putative defendant" and that respondent was not a "putative defendant" when he appeared before the grand jury, because the government did not then intend to seek his indictment.[15]

The special attorney who had presented witnesses to the grand jury testified that, while he knew of the transaction between respondent and Officer Cavalier, respondent was not a target for indictment at the time he was called to testify before the grand jury: "I had no idea that he would be indicted. I had no intent to present any indictment, to pursue an indict-

[15] Courts have resorted to a variety of imprecise categories for characterizing the individual who falls somewhere between an ordinary grand jury witness and an actual defendant: a *de facto* defendant (*United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955); probable defendant (*United States* v. *McGinnis*, 344 F. Supp. 89, 94 (S.D. Tex.)); prospective defendant (*United States* v. *Haas*, 126 F. Supp. 817, 818 (S.D. N.Y.)); target defendant (*In re Liddy*, 506 F. 2d 1293 (C.A. D.C.); potential defendant (*United States* v. *Keenan*, 267 F. 2d 118, 126 (C.A. 7)); virtual defendant (*United States* v. *Morado*, 454 F. 2d 167, 173 (C.A. 5)). The imprecision and variety of the categories is matched by a similar imprecision with regard to the weight to be given various subjective factors (the government attorneys' knowledge or intention) and objective factors (the amount of incriminating evidence) in determining whether a given witness comes within the category.

ment, or in any other way to consider an indictment in regard to the negotiations or attempt to purchase heroin between Officer Cavalier and Mr. Mandujano" (App. 42). Indeed, the attorney testified that he had not even realized at the time that the uncompleted transaction between respondent and the officer was an indictable offense (App. 44), and he only learned that it was when later reviewing a possible perjury indictment with another government attorney (App. 36). Officer Cavalier testified that because there had been no "actual transaction," the case had been closed (App. 51).

The foregoing testimony was uncontroverted, and at the conclusion of the hearing the district court expressed the belief that the special attorney and the officer had testified "very frankly and very candidly" (App. 54–55). Nevertheless, the district court's written opinion concluded that "though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants" (Pet. App. D, p. 29A). This conclusion appears to have been based on the fact that the questioning of respondent specifically covered the information known to the attorney regarding the attempted sale to Officer Cavalier and the fact that such information, if accurate, tended to establish the commission of a criminal offense.

It is unclear from the district court's discussion whether it meant to find that the special attorney had

testified falsely in his unqualified assertion that there was no thought of indicting respondent at the time he was called to testify, or whether, as seems more likely, it rested its conclusion on an objective standard measured by the "high likelihood that the answers provided by * * * [respondent] would furnish material for further action on the part of the government" (Pet. App. D, p. 30A). If the former, the conclusion is contrary to the evidence and clearly erroneous (at least in the absence of a finding that disbelief was rooted in the demeanor or credibility of the special attorney, and there is no intimation of any such finding). The conclusion that the special attorney had an "eye on a possible prosecution" rested on the fact that the questioning of respondent covered the specific, known incident (*id.* at 29A); but the reason for that approach was fully and reasonably explained by the special attorney in his testimony (App. 45–46):[16]

> Q. All right, sir. Now, on your direct testimony, in response to Attorney Sandoval's questioning as to your prior knowledge of this event and your asking questions as to this prior dealing with Officer Cavalier by defendant Mandujano, is that a standard procedure that

[16] The reason for calling respondent as a witness was also clearly and reasonably explained (App. 45): "Officer Cavalier saw him place several calls, and Mr. Mandujano stated to Officer Cavalier that he would try to get such and such a source to provide the heroin, on and on like that. Now, we wanted to get the details of this activity. In other words, who these sources for Mr. Mandujano are and whatever details the grand jury could determine of the actions of these potential sources, potential, clearly potential, inasmuch as they came from statements given by Mr. Mandujano and activity by him."

you use in interrogating witnesses before a grand jury—to have prior knowledge to inquire about?

A. I don't believe we subpoenaed any witness that we didn't have an existing body of knowledge about, and in virtually every case we would ask questions about facts that we did have. That was, number one, a method to gauge the truthfulness of the person's testimony, and, number two, it was in the nature of a natural progression to result in answers to the ultimate questions. * * * In the case of Mr. Mandujano we had information which led me to believe that he was being supplied heroin by one person regularly and possibly several other persons, and before I could determine whether—who these people were, the circumstances of the deliveries and whatever, I had to go through the step of determining whether he ever offered to get heroin for anybody or to sell heroin.

In view of the cogency of this uncontroverted explanation, we think it more likely that the district court disregarded rather than disbelieved the government attorney's denial of prosecutive intent. In so doing, and in emphasizing instead the incriminating evidence available to the government prior to grand jury questioning, the district court relied (Pet. App. D, pp. 34A–35A) upon a test for identifying a "putative defendant" that previously had been employed by the district court for the Northern District of Ohio in *United States* v. *Fruchtman,* 282 F. Supp. 534, 536 (where a similar denial by the government that the witness had been considered a potential defendant at

the time of grand jury questioning was deemed irrelevant):

> [It] does not appear that the examination would have been conducted any differently if [the witness] had [been a potential defendant] * * *. [A] man's rights do not depend on the subjective intent of the prosecutor nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law.

This test for determining who is a "putative defendant"—looking to whether there was incriminating evidence available to the prosecutor prior to questioning—would in effect bring every grand jury witness against whom the government has some potentially incriminating evidence within the protective ambit of the "putative defendant" label. As to many of these witnesses, however, the government has no actual intention of seeking an indictment—because the witness (perhaps occupying a lower echelon of an ongoing criminal enterprise) is more valuable as a source of evidence against others; because the witness's alleged offense is trivial relative to the time and resources necessary to prosecute him; or because the evidence is deemed inadequate to indict. Indeed, the district court's broad test would discourage the cooperation of precisely those witnesses whose knowledge of illegal activities is most crucial to the grand jury's efforts to determine whether crimes have been committed and, if so, who is involved.

Moreover, the test presents numerous and varied problems for both prosecutors and courts because

of the difficulty of identifying who is within the "putative defendant" category. If an attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness and therefore fails to administer appropriate warnings, the witness is then free to perjure himself with impunity, since the sanctions for perjury thereby evaporate. Conversely, the ordinary witness given *Miranda* warnings as a precaution against the possibility of a subsequent determination that he had been a "putative defendant" may be inhibited from providing the grand jury with useful or needed evidence (perhaps out of fear that he is indeed a prospective defendant). Commentators have stressed the problems inherent in the so-called "objective" test for determining who is a "putative defendant" at the time of grand jury questioning:

> The widespread and intricate investigations by federal grand juries * * * do not lend themselves to simple tests of "focus" or "purpose" or even "probable cause." The existence of probable cause may conceivably be determined after analysis of a lengthy record, but when the grand jurors or prosecutors have not yet analyzed their record, * * * they may not realize it. Yet hindsight * * * particularly if the test is to be objective, could serve to vitiate much of their work by suppressing testimony taken [while the record is being made]. [Enker and Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois,* 49 Minn. L. Rev. 47, 74 (1964).] [17]

[17] This highlights an important distinction, seemingly overlooked by the courts below, in the types of grand jury inquiries that can exist. Sometimes there is a known and

If a "putative defendant" must be warned of his Fifth Amendment rights prior to testifying before the grand jury, we submit that the proper test for identifying him should require that a subjective as well as an objective standard be satisfied, with principal emphasis on the former. That is, it must be established *both* that the witness was in fact a target of the grand jury investigation whom the government attorney expected to be indicted, and that the government possessed substantial evidence to support an indictment at the time the witness appeared to testify before the grand jury. Under this test, as we have indicated, respondent was not a "putative defendant" when he appeared before the grand jury.

We submit, moreover, that there is no significant pragmatic objection that can fairly be made to the use of a subjective standard in this area. The only hazard it presents in the fact-finding process is the risk of false testimony regarding the state of mind of the government attorneys at the time the witness was called to testify. Whatever may be said regarding

---

reported crime (perhaps an assault or a bank robbery) and the grand jury is convened for the purpose of considering indictment of a particular suspect; in such a context, the "putative defendant" concept as elaborated in this case is adequate. In many other cases, of which this is one, the grand jury's efforts are directed toward uncovering the very existence of secret criminal activity (*e.g.*, most probes of official corruption, broad-based inquiries into narcotics trafficking or extortionate credit transactions, or the like). In such instances, the "objective" standard for defining "putative defendants" is both inappropriate in fact and likely to be destructive of the effective functioning of the grand jury.

the incidence of perjury by police officers during suppression hearings, we think there is minimal risk that government attorneys, given their special responsibilities in the administration of the criminal justice system and their status as officers of the court, would testify falsely. While such an occurrence is not impossible, the risk is surely sufficiently slight that it is unjustified to adopt an otherwise undesirable rule of law solely to avoid it. In short, the subjective standard, applied after full opportunity for cross-examination and without impairment of the right of the judge to assess credibility, is both viable and appropriate if the "putative defendant" concept is to be prescribed by the courts as a standard for defining the obligations of government attorneys in conducting grand juries.

III. THE GOVERNMENT'S FAILURE TO GIVE ADEQUATE WARNINGS SHOULD NOT RESULT IN THE SUPPRESSION OF TESTIMONY IN A SUBSEQUENT PROSECUTION FOR PERJURY

Even if the court of appeals were correct in its determination that the government violated respondent's privilege against compulsory self-incrimination by failing to give him complete *Miranda* warnings prior to his testimony, the court's remedy—suppression of respondent's testimony in a subsequent prosecution for perjury—is unwarranted by policy or precedent.[18]

---

[18] Virtually every other court that has considered the issue has concluded that even if putative defendants are entitled to some *Miranda* warnings, failure to give the warnings does not license them to commit perjury. See, *e.g.*, *United States* v. *Win-*

1. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States,* 222 U.S. 139, 142. See also *Harris* v. *New York,* 401 U.S. 222, 225; *Bryson* v. *United States,* 396 U.S. 64, 72. A witness may properly resist efforts to compel him to incriminate himself (see, *e.g., Lefkowitz* v. *Turley,* 414 U.S. 70, 78), and if he submits to such efforts, his incriminating statements may be excludable from future substantive use by the prosecution (*id.* at 79–80; *Maness* v. *Meyers, supra,* opinion of Mr. Justice White). But he may not avoid compulsion by committing perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson, supra,* 396 U.S. at 72.

United States v. *Knox,* 396 U.S. 77, demonstrates the applicability of this proposition to the instant case. There, the defendant had been charged with making false statements in wagering tax forms

---

ter, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7) certiorari denied, 355 U.S. 836; *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Nickels*, 502 F. 2d 1173 (C.A. 7); *Cargill* v. *United States*, 381 F. 2d 849 (C.A. 10), certiorari denied, 389 U.S. 1041; *United States* v. *Pommerening*, 500 F. 2d 92 (C.A. 10), certiorari denied, 419 U.S. 1088, stay granted, January 16, 1975; see also *United States ex rel. Annunziato* v. *Deegan*, 440 F. 2d 304, 306 (C.A. 2); *United States* v. *Pacente*, 490 F. 2d 661 (C.A. 7), rehearing *en banc*, 503 F. 2d 543, certiorari denied, 419 U.S. 1048; but see *United States* v. *Wong, supra.*

required by a statute declared unconstitutional in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62. The district court dismissed the indictment, reasoning that the defendant could not be prosecuted for failure to answer the wagering form truthfully because the Fifth Amendment privilege would have prevented his prosecution for failure to answer the form's questions in the first place.

While this Court agreed that the statute in question "injected an element of pressure into [the defendant's] predicament at the time he filed the forms" (396 U.S. at 82), it held that the defendant's perjury was nevertheless not excusable on Fifth Amendment grounds. The Court reasoned that in making the false statements the defendant took "a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take * * *" (*ibid.*). Rather than inculpate himself in a criminal act occurring in the past, the defendant had in effect committed a new criminal act. "[W]hen [he] responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion" (*ibid.*).

The same reasoning would apply even more forcefully to the instant case. If it is impermissible to lie to the government in the face of the degree of palpable, overt compulsion that confronted Knox, it is manifestly impermissible to answer falsely when, as here, the respondent has every reason to believe that the priv-

ilege is fully available.[19] Indeed, respondent was expressly warned prior to testifying that "[y]ou don't have to answer questions which would incriminate you."

2. The court of appeals nevertheless found the principle enunciated in the *Glickstein-Bryson-Knox* line of cases[20] inapplicable to a "putative defendant" who, without prior benefit of *Miranda* warnings, lies to the grand jury. Evidently recognizing that suppression of such false testimony could not be justified by reference to the self-incrimination provision of the Fifth Amendment, it sought to rest its conclusion on a characterization of the government's conduct in bringing respondent before the grand jury without providing full *Miranda* warnings as being "beyond the *pale of permissible prosecutorial conduct*. We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment" (Pet. App. A, p. 19A; emphasis in original). This was because the court felt that the respondent was being confronted with a "Hobson's choice" (Pet. App. A, p. 15A) between self-incrimination and perjury, and "the attorney's questioning was primarily baiting Mandujano to commit perjury" (*id.* at 11A).

There are, it seems to us, numerous difficulties with the court of appeals' effort to support its holding on

[19] At the time Knox filed his wagering tax form, this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, apparently validated the compulsory requirement of filing such forms.

[20] The decision cites (Pet. App. A, p. 18A) *Glickstein* but makes no reference to *Knox* or *Bryson*.

this "due process" rationale. To begin with, it is difficult to see how it was more unfair to ask respondent questions before the grand jury than it was to require Knox to file a wagering tax form confessing involvment in criminal activities; indeed, unlike Knox, respondent had the unchallenged right to decline to give incriminating answers. Secondly, the "Hobson's choice" discerned by the court of appeals, while reminiscent of the "cruel trilemma of self-accusation, perjury or contempt" decried in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, is critically different in that respondent had (and was told he had) the right simply to refuse to answer questions encroaching on areas of potential self-incrimination. Cf. *Michigan* v. *Tucker, supra*, 417 U.S. at 445.

In seeking to peg its decision on due process grounds, the court of appeals also entirely overlooked the long line of decisions of this Court prior to *Miranda* evaluating the voluntariness and admissibility of statements obtained by interrogation of persons suspected of criminal offenses. The governing criterion in such inquiries was whether the defendant was subject to physical or psychological coercion of such a degree that his "will was overborne at the time" the statements in issue were made. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503, 513; *Lynumn* v. *Illinois*, 372 U.S. 528, 534. Thus, even where a defendant was subjected to incommunicado police interrogation for over twelve hours, during the last seven of which requests by his family and attorney to speak with him were refused by the police, there was no deprivation of due process.

Cicenia v. *Lagay*, 357 U.S. 504.[21] Certainly the interrogation of respondent before the grand jury in the present case was not as coercive as that of *Cicenia*, let alone resembling the kind of interrogative tactics, such as physical abuse (*Brown* v. *Mississippi*, 297 U.S. 278), prolonged isolation from family or friends in a hostile setting (*Gallegos* v. *Colorado*, 370 U.S. 49), or extended and exhausting interrogation (*Watts* v. *Indiana*, 338 U.S. 49), that this Court has considered to violate due process requirements.

These considerations aside, we urge this Court to reject the underlying premise of the court of appeals' decision—that it is inherently unfair to call as grand jury witnesses individuals known or suspected by the government to have some involvement in the kinds of criminal activity under investigation by the grand jury. Common sense tells us that the court was on shaky ground in positing malign motives in the decision to call respondent before the grand jury and question him in the fashion that he was questioned. As the special attorney testified (see pp. 42–43 and n. 16, *supra*), the government had a far more plausible motive for summoning respondent than to "entrap" him into self-incrimination or perjury. Respondent had offered to procure heroin from his sources for sale to the undercover agent, from which it was manifestly reasonable to conclude that respondent could supply the grand jury with names of his sources for heroin, thereby immeasurably aiding the grand jury in its efforts to identify persons involved in distribution of the illicit drug in the district.

[21] While the holding in *Cicenia* was arguably inconsistent with that in *Escobedo*, the latter decision was predicated on Sixth Amendment rather than due process grounds. The *Escobedo* rationale was in turn abandoned in favor of a self-incrimination analysis in *Miranda*.

If the grand jury is to have any realistic hope of succeeding in the mission of ferreting out unreported crime and corruption, it is critically dependent on the ability to obtain information from witnesses such as respondent, who, by virtue of their involvement in or at the fringes of the activities under investigation, are most likely to possess the kind of information that is indispensable to a successful inquiry. And even when a witness is a prime target, he may wish to confess his part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate himself to the satisfaction of the grand jury. See *United States* v *Winter*, *supra*. "Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about matters under inquiry." *United States* v. *Sweig*, 441 F. 2d 114, 121 (C.A. 2), certiorari denied, 403 U.S. 932.

As the Second Circuit recently said in *United States* v. *Del Toro and Kaufman*, Nos. 74–2021, 74–2035, decided February 27, 1975 (slip op., p. 1973): "It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth." So long as the witness's will has not been overborne by threats, trickery, or other forms of actual coercion, the privilege against self-incrimination has not been offended, and due process of law has been accorded.

incriminate him—that he must tell the truth, and that if he lied he could be prosecuted for perjury (App. 5–6).

Nor is there any basis for concluding that the conduct of the government agents in calling respondent to testify before the grand jury about heroin trafficking was "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, cf. *Rochin* v. *California," United States* v. *Russell, supra,* 411 U.S. at 431–432. In obtaining respondent's perjured statements, the government neither subjected respondent to any hardship nor violated any of his fundamental rights. Nor did it deceive him, or in any way participate in an unlawful practice. Cf. *Lewis* v. *United States,* 385 U.S. 206. Its tactic, designed primarily to aid the grand jury in ascertaining whether a crime had been committed and if so by whom, can hardly be said to violate "fundamental fairness" or be "shocking to the universal sense of justice" (*Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246) because it incidentally forced respondent to choose between entirely legitimate alternatives—asserting his privilege or truthfully recounting his knowledge of drug trafficking activities. That respondent chose instead to adopt the wholly illegitimate alternative of committing perjury cannot be attributed to any action that the government took or failed to take. See *United States* v. *Nickels, supra; United States* v. *Fiorillo,* 376 F. 2d 180, 184 (C.A. 2);

3. Apparently being of the view that the only sensible thing for respondent to have done when called before the grand jury was to invoke his privilege and refuse to answer questions, and that it was seriously improper for the government attorney to hope that respondent would voluntarily supply truthful information to the grand jury, both the district court (Pet. App. D, p. 30A) and the court of appeals (Pet. App. A, p. 11A) opined that the action of the attorney "smacks of entrapment." The court of appeals did not indicate whether it was in fact holding that respondent had been entrapped; but a holding that a "putative defendant" who lies to a grand jury has been entrapped into committing perjury (either by the bare fact that he was called to testify or by the failure to give *Miranda* warnings) cannot be reconciled with the concept of entrapment as it has been articulated by this Court.

Entrapment exists only when government officials "implant in the mind of an innocent person the disposition to commit the alleged offense," *Sorrells* v. *United States,* 287 U.S. 435, 442; *United States* v. *Russell,* 411 U.S. 423, 436. Here, however, there was no evidence that the government implanted in respondent's mind the design to commit perjury or in any way thwarted whatever predisposition to tell the truth he might have had. Indeed, at the outset of respondent's appearance before the grand jury he was expressly warned—in addition to being told that he need not answer questions which would tend to

United States v. *Lazaros*, 480 F. 2d 174 (C.A. 6), certiorari denied, 415 U.S. 914.[22]

4. Finally, even if this Court concludes that questioning of "putative defendants" without full *Miranda* warnings is an improper procedure, it is unnecessary to adopt an exclusionary rule to assure compliance with the proper procedure. Unlike the Fourth Amendment exclusionary rule, which is deemed necessary because there is considered to be no other practical means of correcting and forestalling police behavior in violation of the rights protected by that provision, an exclusionary principle in this context would be addressed to regulation of the conduct of government attorneys. There is no reason to suppose that there would be any significant incidence of disobedience by such attorneys to a requirement to administer warnings to witnesses; accordingly, the drastic remedy of exclusion of relevant evidence in criminal cases is not warranted here.

[22] The government's questioning of a witness suspected of having taken part in a criminal offense is different from the abuse of process resulting from repeated summoning of a witness before a tribunal, or summoning a witness even once before a tribunal without jurisdiction to conduct the inquiry, where such action is apparently designed solely to maximize the opportunity for perjury. See *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo.); *United States* v. *Cross*, 170 F. Supp. 303 (D. D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D. D.C.); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio); see also *LaRocca* v. *United States*, 337 F. 2d 39, 43 (C.A. 8).

Even assuming that an exclusionary rule were considered necessary for failures to warn, the deterrent purposes of such a rule would be amply served by providing for exclusion of the testimony from use in a trial of the substantive offense (here, attempted heroin distribution). There would be little or no marginal deterrent effect from the radical measure of suppression in a perjury prosecution. See *United States* v. *Calandra, supra,* 414 U.S. at 348.

Finally, with regard to the propriety of the sanction of suppression in the present case, we note that there is no reason to believe that any deficiency in the warnings actually administered was deliberate. At the time of respondent's grand jury appearance, no court had yet required that *Miranda* warnings be administered to "putative defendants" prior to their testifying before a grand jury. Indeed, only one circuit had then intimated that a "putative defendant" would be entitled to warnings of any kind. *United States* v. *Luxenberg, supra.*[23] As this Court recently noted, "[t]he deterrent purpose of the exclusionary rule necessarily assumes * * * willful, or at the very least negligent, conduct * * *. Where the official action was pursued in complete good faith, * * * the deterrence rationale loses much of its force." *Michigan* v. *Tucker, supra,* 417 U.S. at 447. Suppression of the allegedly perjurious testimony was an inappropriate remedy in this case.

[23] Moreover, it appears that the warning administered to respondent would have satisfied the *Luxenberg* dictum. See n. 8, *supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
ROBERT B. REICH,
Assistant to the Solicitor General.
SHIRLEY BACCUS-LOBEL,
JAMES A. HUNOLT,
Attorneys.

JUNE 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975